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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 MIGUEL A. HERNANDEZ,
11
12 Plaintiff,

13 v.

14 ANDREW M. SAUL, Commissioner
of Social Security,¹

15 Defendant.

Case No. CV 19-1299-AS

MEMORANDUM OPINION

AND ORDER OF REMAND

16
17 For the reasons discussed below, it is hereby ordered that,
18 pursuant to Sentence Four of 42 U.S.C. § 405(g), this matter is
19 remanded for further administrative action consistent with this
20 Opinion.

21
22 PROCEEDINGS

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24 On February 21, 2019, Plaintiff filed a Complaint seeking
25 review of the Commissioner's denial of Plaintiff's applications

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27 ¹ Andrew M. Saul, Commissioner of Social Security, is
28 substituted for his predecessor. See 42 U.S.C. § 405(g); Fed. R.
Civ. P. 25(d).

1 for a period of disability and disability insurance benefits
2 ("DIB"), and supplemental security income ("SSI"), respectively,
3 under Titles II and XVI of the Social Security Act. (Dkt. No. 1).
4 On July 23, 2019, Defendant filed an Answer and the Administrative
5 Record ("AR"). (Dkt. Nos. 18-19). The parties have consented to
6 proceed before the undersigned United States Magistrate Judge.
7 (Dkt. Nos. 14-15). On December 23, 2019, the parties filed a Joint
8 Stipulation ("Joint Stip.") setting forth their respective
9 positions regarding Plaintiff's claims. (Dkt. No. 26). The Court
10 has taken this matter under submission without oral argument. See
11 C.D. Cal. C. R. 7-15.

12 13 **BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

14
15 On November 12, 2015, Plaintiff, formerly employed as a trunk
16 crane operator and light truck driver (see AR 29, 60, 269, 307),
17 filed his DIB and SSI applications alleging a disability onset date
18 of January 1, 2014. (AR 239-48). Plaintiff's applications were
19 denied on June 13, 2016. (AR 157-61). On June 28, 2016, Plaintiff
20 requested a hearing before an Administrative Law Judge ("ALJ").²
21 (AR 164-65). On January 23, 2018, ALJ Paul Coulter held a hearing
22 where Plaintiff was represented by counsel and testified with the
23 assistance of a Spanish-language interpreter. (See AR 51-65). The
24 ALJ also heard testimony from vocational expert ("VE") Kristan

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² It appears that there was no reconsideration of Plaintiff's
28 applications prior to the hearing before the ALJ. (See AR 22).

1 Cicero. (See AR 60-63). On February 12, 2018, the ALJ issued a
2 decision denying Plaintiff's applications. (See AR 22-31).

3
4 The ALJ applied the requisite five-step process to evaluate
5 Plaintiff's case. At step one, the ALJ found that Plaintiff met
6 the insured status requirements through December 31, 2015, and had
7 not been engaged in substantial gainful activity since his alleged
8 disability onset date of January 1, 2014. (AR 24). At step two,
9 the ALJ found that Plaintiff's epilepsy/seizure disorder was a
10 severe impairment.³ (AR 24). At step three, the ALJ determined
11 that Plaintiff's impairments did not meet or medically equal the
12 severity of any of the listings found in 20 C.F.R Part 404, Subpart
13 P, Appendix 1.⁴ (AR 26).

14
15 Next, the ALJ found that Plaintiff had the following Residual
16 Functional Capacity ("RFC")⁵:

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20 ³ The ALJ found that Plaintiff's history of vision problem
21 were non-severe and that Plaintiff's anxiety disorder and
22 adjustment disorder do not cause more than minimal limitation in
his ability to perform basic mental work activities and are
therefore non-severe. (AR 24-25)

23 ⁴ The ALJ specifically considered whether Plaintiff meets the
24 criteria of listing 11.02 (epilepsy), 2.03 (contraction of visual
25 field), and 2.04 (loss of visual efficiency) and concluded that he
did not.

26 ⁵ A Residual Functional Capacity is what a claimant can still
27 do despite existing exertional and nonexertional limitations. See
28 20 C.F.R §§ 404.1545(a)(1), 416.945(a)(1).

1 [Plaintiff can] perform medium work⁶ as defined in 20
2 C.F.R. 404.1567(c) and 416.967(c) in that [he] can
3 lift/carry and push/pull 50 pounds occasionally and 25
4 pounds frequently; stand/walk for about 6 hours and sit
5 for about 6 hours in an 8-hour day. Moreover, [Plaintiff]
6 is capable of frequent postural limitations, frequent
7 overhead reaching, and frequent handling/fingering.
8 Further, [Plaintiff] should avoid all exposure to
9 hazards, such as machinery and heights and should be
10 precluded from jobs requiring driving.

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12 (AR 26-27). At step four, the ALJ determined that Plaintiff is
13 unable to perform any past relevant work. (AR 29). Relying on
14 the VE's testimony at step five, the ALJ found that Plaintiff, with
15 his age (fifty-two on the alleged disability onset date), "marginal
16 education," work experience, and RFC, can perform the following
17 representative jobs existing in significant numbers in the national
18 economy: store laborer (Dictionary of Occupational Titles ("DOT")
19 922.687-058), food service worker (DOT 319.677-014), and cleaner
20 (DOT 323.687-010). (AR 29-30). Accordingly, the ALJ concluded
21 that Plaintiff has not been under a disability, as defined in the
22 Social Security Act, from January 1, 2014, through the date of the
23 decision. (AR 30).

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27 ⁶ "Medium work involves lifting no more than 50 pounds at a
28 time with frequent lifting or carrying of objects weighing up to
25 pounds." 20 C.F.R. § 416.967(c).

On January 10, 2019, the Appeals Council denied Plaintiff's request to review the ALJ's decision. (See AR 1-4). Plaintiff now seeks judicial review of the ALJ's decision, which stands as the final decision of the Commissioner. See 42 U.S.C. §§ 405(g), 1383(c).

STANDARD OF REVIEW

This Court reviews the Administration's decision to determine if it is free of legal error and supported by substantial evidence. See Brewes v. Comm'r, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial evidence" is more than a mere scintilla, but less than a preponderance. Garrison v. Colvin, 759 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial evidence supports a finding, "a court must consider the record as a whole, weighing both evidence that supports and evidence that detracts from the [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001) (internal quotation omitted). As a result, "[i]f the evidence can support either affirming or reversing the ALJ's conclusion, [a court] may not substitute [its] judgment for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).

DISCUSSION

Plaintiff contends that (1) substantial evidence does not support the ALJ's findings that Plaintiff can perform the work of

1 a store laborer, a food service worker, or a cleaner;⁷ and (2)
2 Plaintiff should be able to present and rely on vocational data
3 from non-DOT sources such as the Occupational Outlook Handbook
4 ("OOH"), the Occupational Information Network ("O*NET"), and the
5 Occupational Requirements Survey ("ORS"). (See Joint Stip. at 4-
6 25). After reviewing the record, the Court finds that the ALJ
7 erred at step five, and remand is warranted for further proceedings
8 to determine, based on reliable vocational data and VE testimony,
9 whether there is a significant number of jobs available for
10 Plaintiff in light of his language ability and other relevant
11 factors.

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13 **A. Applicable Law for ALJ's Step-Five Finding**

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15 At step five of the five-step process, the Commissioner has
16 the burden to demonstrate that the claimant can perform some work
17 that exists in "significant numbers" in the national or regional
18 economy, taking into account the claimant's RFC, age, education,
19 and work experience. Lounsbury v. Barnhart, 468 F.3d 1111, 1114
20 (9th Cir. 2006); 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1560(c).
21 "In making this determination, the ALJ relies on the DOT, which is
22 the [Agency's] primary source of reliable job information regarding
23 jobs that exist in the national economy." Zavalin v. Colvin, 778
24 F.3d 842, 845-46 (9th Cir. 2015) (citation omitted); see 20 C.F.R.
25 § 404.1566(d)(1) (noting that the Agency "will take administrative
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27 ⁷ Plaintiff presents this as three separate issues, one for
28 each job, but the Court addresses them together.

1 notice of reliable job information available from various
2 governmental and other publications," including the DOT); SSR 00-
3 4p, at *2 ("In making disability determinations, [the Agency
4 relies] primarily on the DOT (including its companion publication,
5 the SCO) for information about the requirements of work in the
6 national economy."). The Agency may also take administrative
7 notice of reliable job information available in other sources, such
8 as the OOH, which is published by the Bureau of Labor Statistics.
9 20 C.F.R. § 404.1566(d)(2)-(5); 20 C.F.R. § 416.966(d)(2)-(5);
10 Bayliss v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005).

11
12 In addition to the DOT, the ALJ generally relies on the
13 testimony of the VE to make the appropriate determination at step
14 five. 20 C.F.R. § 404.1566(e); 20 C.F.R. § 416.966(e). An ALJ
15 may call upon the VE to testify as to "(1) what jobs the claimant,
16 given his or her [RFC], would be able to do; and (2) the
17 availability of such jobs in the national economy." Tackett v.
18 Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999). In doing so, an ALJ
19 "poses hypothetical questions to the [VE] that set out all of the
20 claimant's impairments for the [VE's] consideration." Id.
21 (citation omitted). When a hypothetical includes "all of the
22 limitations that the ALJ found credible and supported by
23 substantial evidence in the record," then the ALJ may properly rely
24 on the VE's response. Bayliss, 427 F.3d at 1217-18; Osenbrock v.
25 Apfel, 240 F.3d 1157, 1163 (9th Cir. 2001) (testimony of qualified
26 vocational expert constitutes substantial evidence); Johnson v.
27 Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995) ("[T]he ALJ was within
28 his rights to rely solely on the vocational expert's testimony.")

1 (quoting Conn v. Sec'y of Health and Human Servs., 51 F.3d 607,
2 610 (6th Cir. 1995)). Generally, an ALJ need not inquire into the
3 foundation of the VE's testimony. See 20 C.F.R § 404.
4 1566(c)(5)(e); SSR 00-4P; Johnson, 60 F.3d at 1435-36. Instead, a
5 VE's "recognized expertise provides the necessary foundation for
6 his or her testimony. Thus, no additional foundation is required."
7 Bayliss, 427 F.3d at 1218.

8
9 When there is an apparent conflict between the VE's testimony
10 and the DOT, the ALJ is required to reconcile the inconsistency.
11 Massachi v. Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007). An
12 ALJ need only resolve conflicts between the VE's testimony and the
13 DOT that are "apparent or obvious," which occurs only when VE
14 testimony is "at odds with" DOT requirements that are "essential,
15 integral, or expected" for a particular occupation. Gutierrez v.
16 Colvin, 844 F.3d 804, 808 (9th Cir. 2016).

17
18 **B. Remand Is Warranted for the ALJ's Step-Five Finding**

19
20 Here, the ALJ presented a hypothetical to the VE based on the
21 ALJ's RFC assessment, and the VE testified that Plaintiff could
22 perform several representative jobs existing in significant numbers
23 in the national economy - specifically, store laborer (DOT 922.687-
24 058), food service worker (DOT 319.677-014), and cleaner (DOT
25 323.687-010). (AR 61-62). The VE stated that her testimony was
26 based on the DOT and her vocational knowledge. (AR 63). The ALJ
27 relied on this testimony in his decision to conclude that Plaintiff
28 is not disabled. (AR 29-30).

1 Plaintiff contends that the VE's testimony conflicts with
2 reliable vocational sources, including the DOT, which suggest that
3 Plaintiff's limitations render these jobs unavailable. (See Joint
4 Stip. at 5-8, 12-17). Among these limitations is Plaintiff's
5 inability to understand or communicate in English. (Id. at 6, 13).
6 The ALJ never addressed Plaintiff's English inability, except by
7 noting that Plaintiff testified through a Spanish-language
8 interpreter at the hearing. (AR 22). However, it is amply
9 reflected in the record. For example, Plaintiff specifically
10 reported that he could not speak, read, or understand English, and
11 could not "write more than [his] name in English." (AR 267).
12 Plaintiff used an interpreter at his medical examinations and at
13 the hearing before the ALJ, and his hearing counsel stated that
14 Plaintiff does not speak English. (See AR 53, 64, 404, 417).
15 Moreover, Plaintiff testified that the last grade of school he
16 completed was "Junior high in Mexico." (AR 55).

17
18 As Plaintiff points out, the DOT classifies two of the
19 occupations identified by the VE (food service worker and cleaner)
20 as language level 2 positions, and it classifies the other
21 occupation (store laborer) as a language level 1 position. DICOT
22 323.687-010, 1991 WL 672782; DICOT 319.677-014, 1991 WL 672771;
23 DICOT 922.687-058, 1991 WL 688132. This means that all three jobs
24 as classified in the DOT require at least some ability to speak
25 and write in English. See DICOT, App. C., 1991 WL 688702 (defining
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1 language levels).⁸ Plaintiff correctly contends that the DOT thus
2 presents an "apparent conflict" in the record.⁹ See Pinto v.
3 Massanari, 249 F.3d 840, 843 n.1 (9th Cir. 2001) (requirements of
4 Language Level 1 occupations inconsistent with abilities of
5 claimant who could speak Spanish but spoke "very little English,"
6 and whom the ALJ found "illiterate in English"); Diaz v. Berryhill,
7 2018 WL 1187530, at *6 (C.D. Cal. Mar. 7, 2018) ("A plain reading
8 of the DOT's language level 1 definition requires language ability
9 more advanced than someone who cannot speak English."); Oliva-
10 Hernandez v. Berryhill, 2017 WL 6403085, at *3-4 (C.D. Cal. Dec.
11 14, 2017) (finding ALJ erred in accepting VE's testimony that a

12 ⁸ A language level 1 position requires that the employee be
13 able to speak and write simple sentences, and a language level 2
14 position requires the employee to read at a rate of 190 words per
15 minute, write compound and complex sentences properly, and speak
16 clearly and distinctly with correct pronunciation. DICOT, App.
17 C., 1991 WL 688702. The DOT does not specify that the "language"
must be English, but the Ninth Circuit has reasoned that such a
requirement is the "most persuasive reading" of the DOT. Pinto v.
Massanari, 249 F.3d 840, 844 n.2 (9th Cir. 2001).

18 ⁹ Plaintiff specifically asserts that an "apparent conflict
19 exists between the general educational development described in
20 the DOT [which encompasses language level classifications] and a
21 marginal education found by the ALJ." (Joint Stip. at 13, 16).
Because Plaintiff makes this assertion while contrasting his
English inability with the language/literacy requirements of the
22 respective occupations defined in the DOT and other sources, the
Court construes Plaintiff's argument as raising a conflict between
23 the DOT and the VE's testimony in light of his inability to
communicate in English. (See id.). Although Plaintiff frames this
24 as a conflict with the ALJ's "marginal education" finding, the
Agency considers English language ability as an "education factor."
25 See 20 C.F.R. §§ 404.1564(b), 416.964(b) ("The term 'education'
also includes how well you are able to communicate in English since
26 this ability is often acquired or improved by education"); 20
C.F.R. 404.1564(b)(5), 416.964(b)(5) ("Since the ability to speak,
27 read and understand English is generally learned or increased at
school we may consider this an educational factor").
28

1 functionally illiterate individual could perform occupations at
2 language level 1); Obeso v. Colvin, 2015 WL 10692651, at *15-16
3 (E.D. Cal. Apr. 20, 2015) (remanding where the ALJ found a claimant
4 with limited English could perform occupations at language level 1
5 based on the VE's testimony and "the ALJ did not offer any
6 explanation for her deviation from the DOT"); Salgado v. Astrue,
7 2011 WL 717251, at *4 (C.D. Cal. Feb. 22, 2011) (same, where the
8 jobs at issue required language level 1 or level 2).

9
10 The ALJ erred by failing to address this apparent conflict in
11 light of Plaintiff's inability to communicate in English. See
12 Massachi, 486 F.3d at 1153-54; Pinto, 249 F.3d 840, 846 (9th Cir.
13 2001) (ALJ erred by failing to clarify how claimant's inability to
14 speak English factored into his analysis that claimant could
15 perform her past relevant work, given that the DOT description
16 required language ability above what the claimant possessed).
17 Indeed, the ALJ does not seem to have considered Plaintiff's
18 language limitation in any respect, despite the requirement to do
19 so. See 42 U.S.C. § 1383(c)(1)(A) (requiring the Commissioner to
20 "specifically take into account any linguistic limitation
21 of [the claimant] (including any lack of facility with the English
22 language) in determining, with respect to the eligibility of such
23 individual for benefits"); 20 C.F.R. §§ 404.1564(b),
24 416.964(b) (providing that the Commissioner will consider a
25 claimant's inability to communicate in English when evaluating the
26 claimant's educational background as a vocational factor "[b]ecause
27 English is the dominant language of the country, [and] it may be
28 difficult for someone who doesn't speak and understand English to

1 do a job, regardless of the amount of education the person may have
2 in another language [or level of fluency in another language].").
3 Remand is warranted on this issue.¹⁰

4
5 As for Plaintiff's contentions regarding other vocational
6 sources and limitations,¹¹ the ALJ was not obligated to address
7 non-DOT sources at the hearing. See Shaibi v. Berryhill, 883 F.3d
8 1102, 1109 (9th Cir. 2017), as amended (Feb. 18, 2018); Seaberry
9 v. Berryhill, 2018 WL 1425985, at * 6 (C.D. Cal. March 22, 2018).
10 Moreover, Plaintiff's counsel's own convoluted lay analysis of the
11 statistical data from these sources is inadequate to demonstrate
12 that the VE's job numbers were incorrect. See Jose Alfredo G. v.
13 Saul, 2019 WL 6652086, at *6 (S.D. Cal. Dec. 5, 2019) ("Lay
14 assessments alone are insufficient to undermine the VE's analysis;
15 such attempts have been uniformly rejected by numerous courts.")
16 (internal quotation omitted) (collecting cases); Valenzuela v.
17 Colvin, 2013 WL 2285232, at *4 (C.D. Cal. May 23, 2013) (rejecting

18
19 ¹⁰ Plaintiff does not seek an immediate award of benefits,
20 only "remand[] for further proceedings to take [VE] testimony of
21 whether any significant number of jobs exists for an individual of
22 [Plaintiff's] medical-vocational profile." (Joint Stip. at 26).
23 That is the appropriate relief here. See Treichler v. Comm'r of
24 Soc. Sec. Admin., 775 F.3d 1090, 1100 (9th Cir. 2014) ("[W]e
generally remand for an award of benefits only in rare
circumstances, where no useful purpose would be served by further
administrative proceedings and the record has been thoroughly
developed.") (internal quotations and citations omitted).

25 ¹¹ Plaintiff argues, based on information from several
26 vocational sources in the record - including the OOH, O*NET, and
27 ORS - that the jobs identified by the VE do not exist in significant
28 numbers for a person with Plaintiff's education, language ability,
exertional level, and limitations in walking, standing, and
sitting. (See Joint Stip. at 5-8, 12-17).

1 plaintiff's assessment, in part, because it "was unaccompanied by
2 any analysis or explanation from a vocational expert or other
3 expert source to put the raw data into context"). However,
4 Plaintiff properly raised this issue by submitting additional
5 evidence to the Appeals Council (see AR 347-49, 441-80), and he
6 demonstrates at least that the evidence merits further
7 consideration with a VE on remand, in conjunction with the language
8 conflict addressed above. See Cymande S. v. Berryhill, 2019 WL
9 4148351, at *3 (C.D. Cal. May 16, 2019) (remanding for
10 consideration of OOH evidence submitted to the Appeals Council);
11 Harris v. Berryhill, 2018 WL 3493778, at *6 (C.D. Cal. July 20,
12 2018) (same).

13 14 CONCLUSION

15
16 Accordingly, IT IS ORDERED that Judgment be entered REVERSING
17 the decision of the Commissioner and REMANDING this matter for
18 further proceedings consistent with this decision. IT IS FURTHER
19 ORDERED that the Clerk of the Court serve copies of this Order and
20 the Judgment on counsel for both parties.

21 LET JUDGMENT BE ENTERED ACCORDINGLY.
22

23
24 Dated: March 10, 2020

25
26 _____/s/_____
27 ALKA SAGAR
28 UNITED STATES MAGISTRATE JUDGE